SEP 27 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 407

STEPHEN A. SULENTICH,
Petitioner,

vs.

THE INTERLAKE STEAMSHIP COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE INTERLAKE STEAMSHIP COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Stephen A. Sulentich, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on June 24, 1958.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals (printed in Appendix B hereto, *infra,* p. 5a) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered June 24, 1958. Rehearing was denied on the fourth day of August, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1) and 2101(c).

QUESTIONS PRESENTED.

1. Whether a master, subject to the Jones Act, can by contract condition the rights given seamen by law upon the passage of a physical examination some five weeks after the seaman has been at work aboard ship. Specifically, can a master, in an action by a seaman for damages and for maintenance and cure, assert that the seaman was not its "employee" within the Act because of alleged failure to disclose certain facts in his medical history at the time of a physical examination given the seaman five weeks after he had been aboard ship performing seaman's duties and two days prior to his injury?

2. Do the teachings of this Court on the power of a trial court to direct a verdict apply only where a verdict is directed by the court against the plaintiff on all charges, or are they equally applicable where the court undertakes to direct a verdict to all but one charge of negligence, notwithstanding evidence of other charges which would justify a verdict?

3. In an action under the Jones Act and for maintenance and cure, can a Court of Appeals, although a proper Notice of Appeal has been filed from both judgments, refuse to review the judgment on the maintenance and cure count on the ground that the errors were not specifically challenged when the errors of the trial court were attacked as common to both judgments?

STATUTES AND TREATY INVOLVED.

The statutory provisions involved are the Jones Act, 38 Stat. 1185, 46 USC, Section 688, and the Federal Employers' Liability Act, 35 Stat. 65, 45 USC, Sections 51, 55. (Appendix A, *infra*, p. 1a)

The treaty involved is the Shipowners' Liability Convention, 54 Stat. 1693 (reprinted, *infra*, Appendix A, p. 3a).

STATEMENT.

Petitioner, Stephen A. Sulentich, sought damages for injury and sickness sustained while a seaman serving as a crew member of the "D. O. Mills", a vessel engaged in constant travel around the Great Lakes.

One count sought damages under the Jones Act, the other sought maintenance and cure. (A. 4.) As an affirmative defense to both counts, Respondent pleaded that Petitioner "was not rightfully or lawfully in the employment of defendant at the time of his alleged accident" because he had misrepresented his prior condition of health during a physical examination, made some weeks after Petitioner had entered on duty as a seaman. (A. 11.)

On the narrow issues submitted to it, the jury returned a general verdict against Petitioner. (A. 401.) The trial judge entered findings of fact and conclusions against Petitioner under the maintenance and cure count. Two separate judgments were entered, one on the general verdict, the other under the maintenance and cure count.

In June of 1953, Petitioner, Stephen A. Sulentich, with no prior experience as a seaman, sought employment at the office of the Lake Carriers' Association in Duluth. (A. 53.) This office served as a hiring hall of seaman for ship owners. (R. 8.)

Subsequently, the Lake Carriers' Association notified him it had a position for him. The Association said nothing about a physical examination. He was sent to the S. S. Mills where he was assigned a bunk and directed to go on watch. Nothing was said of a physical examination when he went aboard ship. (A. 53, 54, 55.)

He signed the ship's articles, which read in part thus:

> "It is mutually agreed that the employment hereunder shall be subject to health examination, which shall be given by a physician furnished by the vessel. In case any member of the crew fails to pass such examination, his term of employment hereunder shall cease." (A. 203, 44.)

From July 11, 1953 until August 17, 1953 he was a coal passer, shoveling ashes in the hole, and assisting the firemen in the fire hole in fueling the fires and blowing the flues. (A. 55.) His duties were varied and arduous. (A. 57, 58.) He worked from 2:00 A.M. to 6:00 P.M., and from 2:00 P.M. to 6:00 P.M. (A. 56.)

He admittedly did this work without difficulty. (A. 58. R. 220, R. 1105-1107.)

During the period from July 11 to August 17, the ship had been in ports on the various Great Lakes at Minnesota, New York, Ohio, Illinois, Wisconsin and Pennsylvania. (R. 83-95.)

On August 17, 1953, while the plaintiff was descending a stairway from the engine room to the crank room, where he was directed to go by his superior, he slipped and injured his back. Subsequently, he was operated upon by a physician of Respondent's choice at the request of Respondent's Safety Director (A. 72, 73, 77), and again at Public Health Hospital in Chicago. Both surgical procedures were to the back. (A. 73, 77.)

On August 15, at Duluth, Minnesota, Petitioner, with others, was given a medical examination. Petitioner passed the examination. (A. 60; plaintiff's Ex. 10.)

At the time of the examination, Petitioner signed his name to two identical forms. (Defendant's Exs. "N" and "O", A. 386-387. These are also referred to as "Defendant's Exhibits "C" and "D".) These are reproduced as Appendix C of this Petition. (See pp. 15a, 16a, *infra.*). Defendant's Exhibit O was blank at the time it was signed. (A. 32.)

Defendant's Exhibit "N" was in the handwriting of the examiner, Dr. Shuman. (A. 294.) On that report by Dr. Shuman, there is nothing written concerning Petitioner's past medical history. The form report signed in blank by Petitioner, Defendant's Exhibit "O" was sent by Dr. Shuman to his employer in Cleveland, Ohio, where some unidentified person made many entries in that blank form, including a past medical history of freedom from back trouble. (A. 329.)[1]

Petitioner, in these proceedings before and at trial admitted a medical record of back pain and that he was the recipient of disability compensation for that condition. (A. 40-43, 52.) He stated that Dr. Shuman did not ask him anything about his back when he examined him. (A. 217.)

Over Petitioner's objections, the Court instructed the jury that if Petitioner had entered upon his appointment

[1] Although Dr. Shuman had no recollection of ever seeing the man, and although the typwritten report, the only one shown him by defendant when he testified, did not refresh his memory, he was allowed to state over specific objections and motion to strike that Petitioner made certain statements concerning his past medical history. (A. 306)

with the understanding that his continued employment was subject to successfully passing a health examination, and that he had fraudulently *concealed or misrepresented* his physicial condition in material respects at the time of such examination, "then plaintiff was not a matter of right defendant's employee . . . and is not entitled to recover . . ." (A. 397).[2]

Succinctly stated, the Court of Appeals held:

1. A master by contract could determine under what circumstances a seaman was its employee within the Jones Act;

2. The decisions of this Court concerning the arena of court and jury did not apply where the trial court

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[2] "If you believe from the preponderance of the evidence (1), that as one of the terms and conditions of his initial employment on July 11, 1953, the plaintiff's employment was subject to a health examination, and in case he failed to pass such examination, his employment should cease; (2) **that upon the health examination on August 15, 1953 the plaintiff knowingly misrepresented to or concealed from the examining physician the fact that he had sustained previous injuries and suffered back pain, or that he had been discharged from the military service for physical disability,** or **that he had been and was then receiving veteran's disability benefits based on a rating of 30 per cent disability,** (3) that such misrepresentation or concealment was material, and (4) that such misrepresentation or concealment was relied upon by the defendant, and that plaintiff would not have been permitted to continue to work and remain aboard the vessel if the true state of facts had been disclosed by him, then plaintiff was not as a matter of right defendant's employee on August 17, 1953 at the time of his alleged accident, and he is not entitled to recover under the statute under which this action is brought, and you should find the defendant not guilty. You are further instructed that the burden of proof is upon the defendant to prove by the preponderance of the evidence each of the four above-mentioned elements." (R. 1846, 1897).

refused to submit issues supported by competent evidence, but only where a verdict was directed against the servant on all charges.

3. It would not review a judgment entered on the maintenance and cure count, although a proper notice of appeal therefrom was filed, and although errors alleged were common to both counts of the complaint.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals for the Seventh Circuit to the effect that a master can, through contract, determine the circumstances which bring a seaman within the Act is in direct violation of Section V of the Act and with the decisions of this Court and other courts.

Section V provides:

> "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . ." (45 USCA, Sec. 55).

This Court, in *Philadelphia, Balt. & Wash. R. R.* v. *Schubert*, (1912) 224 U.S. 603, in upholding Section V, pointed out Congress' purpose "was to enlarge the scope of this Section (V) and to make it more comprehensive. . . ." It includes every variety of agreement or arrangement (p. 611).

In *Payne* v. *Daugherty*, (1922; C.A. 8) 283 F. 353, the Court excluded evidence concerning fraudulent misrepresentations as to state of health made at time of obtaining employment "in view of the positive terms of Sections I and V."

So also in *Sea Shipping Co.* v. *Sieracki*, (1946) 328 U.S. 85, 90, 97, it was decided explicitly a servant's status could

not be determined by contract, but that the character of his work was the sole test.

2. Prior to this decision, no court had ever held that fraud committed by a servant subsequent to the entry upon the relationship can dissolve that relationship retroactively. So long as the relationship existed, there was the attendant obligation of the master, and the concurrent rights of the servant.

The Eighth Circuit, in *Payne* v. *Daugherty*, (1922; C.A. 8) 283 F. 353, pointed out that there could be no retroactive dissolution of the relationship. As recently as 1955, the Third Circuit, in *Casso* v. *Penn. R. Co.*, 219 F. 2d 303, 304, decided that if the plaintiff had been put to work before the application containing the misrepresentations had been filled in, there could no defense of fraud.[3]

Here the court proceeded on the theory that if there was fraud, although committed after the man was an employee, it retroactively dissolved his status as an employee, notwithstanding that throughout this period he did seaman's work, and had all the duties and burdens of a seaman.

Illustrative of this principle is the Shipowners' Liability Convention, 54 Stats. 693. It relieves the shipowner from his obligation of maintenance and cure only in case of "sickness and infirmity intentionally concealed when the engagement is entered into" (Article II, Clause 2(c)). (App. *infra*, p. 3a)

3. The decision of the court below on the question of fraud conflicts with the decision of this Court and many other courts holding that fraud of an employee to defeat recovery under the Federal Employers' Liability Act

[3] "There is some doubt whether the plaintiff had not been 'hired' and put to work for the defendant, glass eye and all, before this application was filled in. If this were the situation it is quite clear that the defendant could not be heard to say that it was deceived by anything said by the plaintiff."

must have had a causal relationship to the fact of the accident. (*Minneapolis, St. P. & S. S. M. v. Borum*, 286 U.S. 447.)[1]

There is conflict between the circuits as to what constitutes a "causal relation" between the alleged fraud and the injury.

In *Payne v. Daugherty*, (1922; C.A. 8) 283 F. 353, 354, the 8th Circuit determined the test of causal relationship to be whether the fraud contributed to cause the accident. This is the general rule. On the other hand, *Southern Pacific Co. v. Libbey*, (1952; C.A. 9) 199 F. 2d 341, 348, states that causal relationship means whether the examining doctor would have passed the applicant. In *Talarowski v. Pennsylvania R. R. Co.*, (1955) 135 Fed. Supp. 303, 304 (D.C. Del.), a motion to strike affirmative defense of fraud was denied. Although no causal relationship between the fraud and the injury was pleaded.

This Court has not entertained the question of the circumstances under which fraud can affect a contract of employment since 1932. As is apparent, there is much

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[1] In 136 A.L.R. 1125, where this question is annotated, it is said:

> "Although there is some authority to the contrary, the greater number of cases, many of which involved actions under the Federal Employers' Liability Act and Workmen's Compensation statutes, subscribe to and apply the rule that, where employment is induced by false and fraudulent representations not going to the factum of the contract, the contract is voidable and not void, and therefore the relation of employer and employee exists, even though the misrepresentations may form a just reason for the rescission of the contract; consequently recovery may be had of the employer by the one guilty of the misrepresentation, and who is injured through the negligence of the employer, at least where there is no causal connection between the injury and the misrepresentation."

Then follows a large number of cases in support of this principle.

misunderstanding of how and under what circumstances fraud can affect the status of the servant. This is a question which frequently appears both under the Federal Employers' Liability Act and in Jones Act cases. For a uniform administration and interpretation of these Acts, the Court should grant the writ and clearly enunciate this doctrine. It would aid trial and appellate courts, since it is a matter of common knowledge the employee's status as such is frequently questioned in many of the thousands of cases pending in State and Federal Courts under these important Federal statutes.

4. Again, notwithstanding the reiterated teachings of this Court concerning the function of the judge and the jury, the Court of Appeals has here held that "they (*Rogers* v. *Mo. Pac. R. Co.*, (1957) 352 U.S. 500; *Ferguson* v. *Moore-McCormick Lines, Inc.*, (1957) 352 U.S. 521) deal with the question of whether the trial court was or was not correct in taking the entire case from the jury and directing a verdict for the defendant" (Appendix B, *infra* p. 14a). In other words, it is proper to refuse to grant a jury trial on some issues, albeit there be evidence to support them.

The decisions of this Court require the trial judge to submit to the jury *all jury issues, not one jury issue.*

Here the Court told the jury over objection that the only ground of negligence which could be considered was the condition of the steps.[5]

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[5] "Plaintiff alleges in his complaint that while proceeding down a flight of steps the treads of which were defective, smooth, shiny and worn, he was caused to slip and fall on an accumulation of oily water. **The negligence relied upon is that the treads were permitted to become defective, smooth, shiny or worn or that oil or water or both were negligently permitted to be on the treads of the stairway and caused the plaintiff to fall. These are the only grounds of negligence which you may consider."** (App. p. 395.)

The evidence showed a steep staircase of solid steel plates about three feet wide and eight inches deep, approximately fifty years old, with edges beveled from usage (App. 63). An abrasive material was on the steps, but it varied with the different steps (App. 63, 64). Oil and water were on the stairs, as well as on the deck of the crank room to which they led (App. 67). The stairs were customarily washed off with hose, but no provision was made for drainage. The angle of the stairs depended on how the ship was loaded (R. 1125, 1126). There was a handrail but it did not run the length of the stairway (Plaintiff's Ex. 3, A. 385).

Evidence was offered to show that other ships have grated steps which carry off water. The trial court sustained objection, stating that the only issue was the condition of these steps.[6]

The right to make proof of safer methods was substantive. It was not a mere evidentiary matter.

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[6] "By the Court: . . . I think the views I expressed a few minutes ago, that the mere fact that there may be other different types of treads in use on other boats is inadmissible, and that the evidence to the effect that there were, would tend to confuse the jury and divert their attention from the real issue." (App. p. 262.) This went to the core of the action. **(Bailey v. Central Vermont Ry. Co.**, 319 U.S. 350 (1942); **Boston & M. R. Co. v. Meech**, (1922; CA 1) 156 F. 2d 109; **Poignant v. U. S.**, (1955; CA 2) 225 F. 2d 595.) The opinion of the Court of Appeals does not correctly describe what occurred on the offer of this evidence. (App. 259-265 inc.)

But there is more. The ship was undermanned and hence unseaworthy. There were two oilers at the time of the accident, whereas there were usually three. Usually there were one chief engineer and three assistants, but at the time of this occurrence one was injured and one was sick. (A. 100, 1108.) The importance of these facts is obvious when it is realized the oiler's job was to keep these steps clean (A. 1122, 1125.) Moreover, the engine room crew under whom the oilers worked had to double up. (R. 1108.)

None of these issues was given the jury.

The Court of Appeals declined to review the conduct of the trial court under the maintenance and cure count. The Notice of Appeal specified both judgments. The record on appeal was prepared to present the error under the maintenance and cure count. The principal propositions of law asserted in Petitioner's brief were that plaintiff was in fact and in law an employee of defendant, and that the defense afforded Respondent by the trial court was not a defense in law.[7]

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[7] The first paragraph of "Summary of Argument" read thus:

> "As a matter of law, the affirmative defense that the relationship of master and servant between the defendant and plaintiff did not exist at the time of the accident, is not available to the defendant. . . ." (p. 4, Brief and Argument for Plaintiff.)

Point I-A under the Brief and Argument read thus:

> "The plaintiff had been an employee of defendant for six weeks prior to the accident. He continued thereafter to do the same work, up until his accident. His employment status was unchanged." (p. 6, Brief and Argument for Plaintiff.)

Plaintiff's Reply Brief read thus:

> "II. Plaintiff was Defendant's Employee." (p. 6, Plaintiff's Reply Brief.)

The Court of Appeals thus in effect abdicated its function when it refused to review the judgment on the maintenance and cure count.*

Under Rule 73 (Federal Rules of Civil Procedure, 28 U.S.C.A.) a notice of appeal is the only necessary step for a review of a judgment. Then, too, there is the Congressional mandate that on appeal ". . . the court shall give judgment after an examination of the record without regard to errors and defects which do not affect the substantial rights of the parties." (Title 28 U.S.C.A.; Sec. 2111.)

This forfeiture by the Court of Appeals of Petitioner's right to have the judgment on the maintenance and cure count reviewed is directly in the teeth of recent decisions by this Court. (*Hoiness* v. *United States* (1948), 335 U. S. 297, 300, 301; *State Farm Mutual Automobile Co.* v. *Palmer* (1956), 350 U. S. 944; *United States* v. *Arizona, et al.* (1953), 346 U. S. 907. This refusal is also contrary to decisions by other courts of appeal. In *Zumwalt* v. *Gardner* (1947; C.A. 8), 160 F. 2d 298, the defective brief was almost unintelligible; in *Fishbaugh* v. *Armour & Co.* (1950; C.A. 4), 185 F. 2d 541, the notice of appeal was filed late, and in *Ry. Express Agency* v. *Jefferson* (1957; C.A. 8), 240 F. 2d 189, the notice of appeal specified an order denying a post trial motion rather than the judgment. Yet in each instance review was entertained.

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*As a result of its failure to review the error under the maintenance and cure count, the incongruity of the Court of Appeals' opinion is not apparent. Under the Shipowner's Liability Convention fraud, as a defense to maintenance and cure is, as pointed out supra, confined to fraud committed "at the time of the engagement". Hence, Petitioner was a seaman as to the maintenance and cure count, but not as to the Jones Act count, under this decision.

If defects in the Notice of Appeal, a jurisdictional document, are not grounds for dismissing an appeal *a fortiori*, any hypertechnical defects in Petitioner's brief cannot be grounds for such dismissal.

CONCLUSION.

It is respectfully submitted that because of the far-reaching import of these questions in the day to day trials of master and servant actions, and the conflicts amongst courts, this Petition for a Writ of Certiorari ought to be granted.

Respectfully submitted,

JAMES A. DOOLEY
Attorney for Petitioner

APPENDIX A.

JONES ACT

46 USC Sec. 688. *Recovery for injury to or death of seaman.*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

PROVISIONS OF FEDERAL EMPLOYERS LIABILITY ACT

45 USC Sec. 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such

commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin, dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

* * *

45 USC Sec. 55. *Contract, rule, regulation, or device exempting from liability; set-off.*

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

PROVISIONS OF THE SHIPOWNERS' LIABILITY CONVENTION.

54 Stat. 1693

Article 1. 1. This Convention applies to all persons employed on board any vessel, other than a ship of war, registered in a territory for which this Convention is in force and ordinarily engaged in maritime navigation.

* * * *

Article 2. 1. The shipowner shall be liable in respect of—

(a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;

(b) death resulting from such sickness or injury.

2. Provided that national laws or regulations may make exceptions in respect of—

(a) injury incurred otherwise than in the service of the ship;

(b) injury or sickness due to the willful act; default, or misbehaviour of the sick, injured, or deceased person;

(c) sickness or infirmity intentionally concealed when the engagement is entered into.

3. National laws or regulations may provide that the shipowner shall not be liable in respect of sickness, or death directly attributable to sickness, if at the time of the engagement the person employed refused to be medically examined.

* * * *

Article 12. Nothing in this Convention shall affect any law, award, custom, or agreement between shipowners and seamen which ensures more favourable conditions than those provided by this Convention.

* * * *

Article 20. The French and English texts of this Convention shall both be authentic, with the following understanding to be made a part of the ratification:

U. S. Understandings

"That the United States Government understands and construes the words 'vessels registered in a territory' appearing in this Convention to include all vessels of the United States as defined under the laws of the United States.

"That the United States Government understands and construes the words 'maritime navigation' appearing in this Convention to mean navigation on the high seas only.

"That the provisions of this Convention shall apply to all territory over which the United States exercises jurisdiction except the Government of the Commonwealth of the Philippine Islands and the Panama Canal Zone, with respect to which the Government reserves its decision."

APPENDIX B.

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 12125, SEPTEMBER TERM, 1957—APRIL SESSION 1958

STEPHEN A. SULENTICH,
Plaintiff-Appellant,
v.
THE INTERLAKE STEAMSHIP COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 24, 1958.

Before MAJOR, FINNEGAN and PARKINSON, *Circuit Judges.*

PARKINSON, *Circuit Judge.* This appeal follows a judgment on a jury verdict in favor of defendant in an action for damages under the Jones Act, 46 U.S.C.A. § 688.

Plaintiff's complaint is in two counts. Count I, seeking damages for personal injuries under the Jones Act, was tried to a jury and Count II for maintenance and cure was tried to the court.

Although plaintiff's notice of appeal stated that he was appealing from both the judgment on the jury verdict for the defendant on Count I and from the judgment of the court for the defendant on Count II, he asserts in his brief that "[t]he errors relied upon arise out of instructions, rulings on evidence, direction of a verdict on certain charges, and failure of the defendant to maintain its affirmative defense." He deals with these alleged errors only as they affect the jury proceedings on Count I and

limits the contested issues to two in number both of which relate solely to the Jones Act. Hence it follows that the judgment on Count II as tried to the court must be affirmed as it has not been challenged on this appeal.

The defendant, therefore, insists that this appeal should be dismissed because the judgment of the court on Count II is *res judicata* of plaintiff's right to recover under the Jones Act on Count I. We do not agree and we hold that the plaintiff is entitled to have the alleged errors upon which he relies, arising out of the jury proceedings under Count I as stated by him in his brief, considered by this court.

The plaintiff contends that "[t]he defendant failed to sustain the burden of its affirmative defense, which was that the relationship of master and servant did not exist at the time of the accident"; that "[e]ven though the plaintiff may have misrepresented his condition of health in a physical examination taken long after his entry into defendant's employment, such misrepresentation would not *ipso facto* void his contract of employment, and an instruction to that effect is erroneous as withdrawing from the jury an important issue of fact"; that "[s]ince the instruction[1] was erroneous, it was presumptively injurious to plaintiff and furnishes ground for reversal unless the defendant affirmatively shows that it was harm-

[1] If you believe from the preponderance of the evidence (1) that as one of the terms and conditions of his initial employment on July 11, 1953, the plaintiff's employment was subject to a health examination, and in case he failed to pass such examination, his employment should cease; (2) that upon the health examination on August 15, 1953 the plaintiff knowingly misrepresented to or concealed from the examining physician the fact that he had sustained previous injuries and suffered back pain, or that he had been discharged from the military service for physical disability, or that he had been and was then receiving veteran's disability benefits based on a rating of 30% disability; (3) that such misrepresentation or concealment was material; and (4) that such misrepresentation or concealment was relied upon by the defendant, and that plaintiff would not have been permitted to continue to work and remain aboard the vessel if the true state of facts had been disclosed by him, then plaintiff was not as a matter of right defendant's employee on August 17, 1953 at the time of his alleged accident, and he is not entitled to recover under the statute under which this action is brought, and you should find the defendant not guilty. You are further instructed that the burden of proof is upon the defendant to prove by the preponderance of the evidence each of the four above mentioned elements.

less"; that "[t]here was no competent evidence on which to base defendant's affirmative defense, or the peremptory instruction;" and that "[t]he court erroneously withdrew from the jury important testimony relating to the employee status of the plaintiff."

These contentions are based primarily upon the false assumption that before the jury could return a verdict in favor of the defendant the defendant had to prove its affirmative defense by a preponderance of the evidence. That is not the law. If the jury found that the plaintiff had failed to prove negligence on the part of the defendant it was warranted in returning a verdict for the defendant even though it also believed that the defendant had failed to sustain the burden of its affirmative defense. That is so elemental that citation of supporting authority would be superfluous.

The plaintiff knowingly failed to disclose his true state of health to defendant's examining physician. He testified as follows:

"Q. And at the time you were taking that examination, Mr. Sulentich, you knew that you had had previous pain in your back before you ever came aboardship?

A. Yes.

Q. And you knew that you had injured your back at Reliance Electric Company?

A. I had a strained condition there, yes, muscle."

* * *

"Q. You knew, however, Mr. Sulentich, that over a long period of time—and I am speaking of your knowledge at the time you were having this physical examination—that you had received medical treatment for your back from the Veterans Administration?

A. Yes, I did.

Q. And you knew furthermore that you were receiving a compensation from the Veterans Administration based on a thirty percent disability?

A. That is right.

Q. And you knew further that you had had attacks of back pain and diathermy and medication for this condition as recently as April, May and June of that year?

A. Well, I had it that year, but I do not know exact dates; treatment, yes."

* * *

"Q. Now, did you disclose any of these conditions to the examining doctor?

A. No, I did not."

The examining physician testified that if the plaintiff had disclosed the true facts concerning his history of back trouble "[h]e would be absolutely unfit to be on board this ship as a seaman", and "if he had given me the correct history as to previous injuries to his back, and would have his employment as a seaman immediately terminated and removed from the ship."

There was evidence introduced that both seamen looking for work and ships needing seamen made request through Lake Carriers Association. It serves as an employment agency and has offices at the principal lake ports. Upon coming aboard a ship the seaman signs "Articles" constituting the contract of employment.

The plaintiff went aboard the defendant's vessel, D. O. Mills, on July 11, 1953 at Two Harbors, Minnesota, and hired out as a coal passer thereon. The Mills, an ore boat, was in almost constant travel around the Great Lakes. Upon coming aboard he signed the Articles, running to July 26, 1953, which contained the following provision:

"5. It is mutually agreed that employment hereunder shall be subject to health examination, which shall be given by a physician furnished by the vessel; in case any member of the crew fails to pass such examination, his term of employment hereunder shall cease."

On July 27, 1953 he signed new Articles, running to August 30, 1953, containing the same quoted provision.

Dr. Castle and Associates examined all seamen employed by the defendant. After the opening of navigation in April such examinations were conducted at Duluth, Minnesota, a port visited by the Steamer Mills about twice a month, by Dr. Schuman of Dr. Castle and Associates. If a crew member was found, upon examination by Dr. Schuman, to have something wrong with him the doctor informed the captain of the ship whereupon the crew member's employment aboardship immediately terminated.

On August 15, 1953 the Mills was in port at Duluth for the first time subsequent to the plaintiff signing aboard on July 1f, 1953. He was then examined by Dr. Schuman. He signed a health examination report at that time certifying immediately over his signature as follows:

> "I hereby certify I have disclosed all previous sickness and injuries and that I am in good health. I also authorize the examining physician to send this report to the employer."

The evidence presented a factual question for the determination of the jury. It was for the jury to decide whether the defendant had sustained its affirmative defense by a preponderance of the evidence.

The plaintiff asserts that the instruction, set out in full in footnote 1, "was a peremptory instruction, directing a verdict for the defendant." A cursory reading of the instruction will immediately demonstrate the fallacy of that contention. It is an instruction mandatory in nature and as such must contain all of the essential elements necessary to warrant a finding under defendants' affirmative defense. This it did.

This instruction clearly informed the jury that if the jury did find from a preponderance of the evidence that the plaintiff knowingly misrepresented to or concealed from the examining physician the facts concerning his previous back injuries; *that such misrepresentation or concealment was material;* that it was relied upon by the defendant; and that plaintiff would not have been per-

mitted to continue to work and remain aboard the vessel if the true state of facts had been disclosed by him, then and only then could the jury find that the plaintiff was not an employee of the defendant on August 17, 1953 and would not be entitled to recover. It must be emphasized that the jury was instructed that the misrepresentation or concealment had to be *material*. This is it had to affect the examining physician's conclusion that he was in good health and should be permitted to work and remain aboard the vessel after August 15, 1953. The court further instructed the jury that the burden of proof was upon the defendant to prove by the preponderance of the evidence *every one* of those elements. We hold that the instruction was a correct statement of the law and was properly given under the evidence in this record.

By giving the instruction:

> "Under the maritime law a seaman who becomes disabled in the service of his ship is entitled to medical care without expense to himself. This obligation falls on the shipowner and exists even though the seaman's employment is not the cause of his becoming disabled and even though the disability occurs without anyone's fault or negligence. Thus, the fact that defendant the Interlake Steamship Company arranged for the hospitalization of plaintiff at Duluth and paid for his surgery should not be considered by you as an admission by defendant of its liability for damages",

the court did not withdraw from the jury important testimony relating to the status of the plaintiff. Counsel for plaintiff made the suggestion to the court below that if it was going to give the instruction "just give the last sentence." If the last sentence was not prejudicial the instruction as a whole was not objectionable. In any event no objection was made to the giving of this instruction in compliance with Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.A., and plaintiff is, therefore, precluded from raising the question now on appeal. *Miller v. New York Central Railroad Company*, 7 Cir., 1956, 239 F. 2d 10, 13.

We have considered with punctiliosity every other contention raised by the plaintiff and find no merit in any of them.

Defendant's Exhibits O and N are written reports of a health examination given the plaintiff by Dr. Schuman aboard the Mills at Duluth, Minnesota on August 15, 1953. The two reports are each signed by both the plaintiff and Dr. Schuman. Dr. Schuman filled out the blanks in Exhibit N in his own handwriting. The blanks in O were later filled in from report N by typewriter. The forms are identical. Both contain a certification by the plaintiff immediately over his signature that he had "disclosed all previous sickness and injuries". He admitted, on cross-examination that he had not.

Both exhibits were admitted in evidence without objection. Plaintiff states, in his original brief, "we specifically objected to its [Exhibit O] introduction * * *; this objection was summarily overruled", but in his reply brief he unequivocally states he did agree to its admission in evidence. In fact in dealing with Defendant's Exhibits O and N the plaintiff asserts in his reply brief "[w]e agreed to their admissibility to demonstrate that Schuman had no answer to the particular questions, and that they were supplied at Cleveland by some third person."

The rule of law, as urged by plaintiff, that a witness may use a *memorandum* prepared by himself to refresh his recollection but when he has testified as to the facts the memorandum is not also admissible in evidence has no application here. Cf. 28 U.S.C.A. § 1732. Defendant's Exhibits N and O were not memoranda but rather written reports prepared by the examining physician and signed by the *plaintiff*. They were admitted in evidence by agreement of the plaintiff.

The trial court did not abuse its discretion in permitting Dr. Schuman to testify as to the questions asked by him of and the answers given by the plaintiff as reflected by the reports signed by himself and the plaintiff. *Lavender* v. *Kurn*, 1946, 327 U.S. 645, 654; *Tatum* v. *U.S.*, D.C. Cir., 1957, 239 F. 2d 129, 132.

The trial court committed no error in ruling as it did as to the witness Eckert. The plaintiff asserts "[o]ur purpose was to show that on many boats the stairs were composed of gratings, from which oil and water would readily drain, so that they would not be so slippery as were the steps on the D. O. Mills."

The plaintiff actually made no such offer to prove, in fact made no offer whatsoever. The trial court asked him what he was offering by the witness Eckert and counsel for the plaintiff announced:

> "Well, I am going to ask the witness and I intended to examine him, your Honor, on the fact that other vessels doing the same kind of work, there were steps which were of a different character than the one involved in the accident, namely steps which were grated."

As to Edward Merchant he was never sworn and placed on the witness stand by the plaintiff. The defendant objected to him as an expert because he was not shown to be so qualified. The plaintiff made no attempt to qualify him and accordingly no question is presented.

Plaintiff insists that a party has the right to comment on the failure of the adverse party to call a material witness shown to be in his control. However, one of the required elements is that he must be a material witness. Plaintiff contends that in *plaintiff's* Exhibit P—he has to mean Defendant's Exhibit because there is no such plaintiff's exhibit—in Chief Engineer Mensen's handwriting is the statement "Lawrence Grabinski saw him after he fell and he was laying on the lower engine room floor." This exhibit was admitted in evidence. We have searched this record and can find no basis for the assertion by the plaintiff that Harvey Mensen could have testified to anything in any manner material to this case.

Plaintiff offered his Exhibit No. 3 a photograph of the stairway involved. It was taken in 1956 after the solid steps with abrasive covers, in use on August 17, 1953, had been removed and the grated surface type steps installed. His offer was as follows:

"May the record show that we are offering it first with the understanding to show the stairway and secondly, for the purpose of showing there is a safer method which could have been employed by this defendant."

The offer itself makes the exhibit inadmissible. Had the plaintiff offered the exhibit for the sole purpose of showing the locus of the accident and the jury were to view it solely to acquaint them therewith that would be one thing, even though the change was a long way from being a slight one, but here the plaintiff offers it for the very purpose of showing the change.

"The rule is universal that evidence offered to show changes made where the injury occurred is not admissible. 31 C.J.S. Evidence §291 p. 1054 n. 2. If, arguendo, it can be assumed that grated steps are safer than solid steps with abrasive covers the photograph was clearly incompetent because sound reason requires that one should be encouraged to improve and not be deterred therefrom by the fear that in so doing the act will be construed as an admission of having been a wrongdoer.

The court instructed the jury that the defendant was liable for injury to an employee "when such injury results in whole or in part from the negligence of any of the officers, agents or employees of the defendant, or by reason of any defect or insufficiency of its vessel or the equipment thereof due to negligence"; "that it was the duty of the defendant to exercise reasonable care to furnish the plaintiff with a reasonably safe place in which to do his work"; and that the only grounds of negligence relied upon by the plaintiff as alleged in his complaint and which the jury could consider was that the treads on the steps "were permitted to become defective, smooth, shiny or worn or that oil or water or both were negligently permitted to be on the treads of the stairway and caused the plaintiff to fall." Under the evidence in this record those instructions were adequate. However, the plaintiff

complains that "[t]here was evidence from which the jury might well conclude that the stairs were not properly inspected, and that plaintiff was not warned of their dangerous condition." Every instruction actually tendered by the plaintiff was given. If there were any tendered by the plaintiff which the court failed to give the plaintiff did not object in compliance with Rule 51 of the Federal Rules of Civil Procedure. He cannot now be heard to complain if the jury was not instructed as fully as he claims it should have been.

The plaintiff cites *Rogers* v. *Missouri Pacific Railroad Co.*, 1957, 352 U.S. 500 and *Ferguson* v. *Moore-McCormick Lines, Inc.*, 1957, 352 U.S. 521 in support of his contention that the court limited plaintiff's recovery to one ground of negligence only. These cases are not even remotely analogous. They deal with the question of whether the trial court was or was not correct in taking the entire case from the jury and directing a verdict for the defendant. The trial court here did not do that. It denied a motion of the defendant made for that purpose and submitted the case to the jury for its determination.

When this entire record is read in context we are convinced that counsel for the plaintiff was denied no rights to which he was legally entitled and has completely failed to demonstrate to this court how he was mistreated in any manner prejudicial to himself or to the plaintiff, his client.

Under the evidence in this record the jury could have found either for the plaintiff or for the defendant. The jury found for the defendant after a fair trial free from prejudicial error. The judgment is, therefore,

AFFIRMED.

APPENDIX C.

DEFENDANT'S EXHIBIT N

The Interlake Steamship Company
HEALTH EXAMINATION

STEAMER D.O. Mills

NAME Stephen A. Sulentich OCCUP. Coal Passer VIA MARINE SERVICE Sta. Tex. Inf. 1-26-18

AGE SEX HEIGHT WEIGHT RACE WHERE BORN

PAST HISTORY: HAVE YOU HAD ANY OF THE FOLLOWING? IF SO, WHEN?

TUBERCULOSIS	BACK PAIN	VENEREAL DISEASE	
ARTHRITIS OR RHEUMATISM	STOMACH TROUBLE	OPERATIONS Tonsils 1924	
FITS OR CONVULSIONS	SPITTING OR PASSING OF BLOOD	INJURIES	
MENTAL OR NERVOUS DISEASE	MALARIA, TYPHOID OR DYSENTERY	OTHER AILMENTS	
HAVING RATS	DIABETES		

HAVE YOU EVER BEEN REJECTED OR DISCHARGED FROM MILITARY SERVICE? WHY?

HAVE YOU EVER RECEIVED OR APPLIED FOR COMPENSATION FROM ANY SOURCE FOR SICKNESS OR ACCIDENT?

CLASSIFIED B

CHECK HERE IF DISQUALIFIED % ACTIVE COMMUNICABLE DISEASE ☐

HEAD	EYES
	Without glasses R 20/20+1 L 20/30+
	With glasses R 20/20+1 L 20/20+1
NOSE	COLOR BLIND
COAT - Tonsils	EARS
HEART	Hearing R 20/20 L 20/20
BLOOD PR. 130/80 PULSE 72	LUNGS
ABDOMEN	
	GENITO URINARY Small Epididymal Cyst Left Testicle
RECTUM HERNIA POTENTIAL HERNIA	
	WASSERMAN
VARICOSE VEINS	SKIN
	VACCIN. SCAR
UPPER EXTREMITIES	LOWER EXTREMITIES Varicose Veins Left Leg

URINALYSIS Sp. Gr. Reac. Alb. Sug.

SCARS, MARKS AND OTHER MEANS OF IDENTIFICATION Scar abdomen 2" L of Left Nipple

PRESENT DISEASES AND DEFECTS FOUND

Varicose Veins - Left Leg - Moderate - Severe; Varicose Veins of Left Testicle - Small Epididymal Cyst Left Testicle; Abdominal Hernia Left Side - Not for Potential Hernia

I hereby certify I have disclosed all previous injuries and injuries and that I am in good health. I also authorize the examining physician to send this report to the employer.

Stephen A. Sulentich
Signature
(To be signed in examining physician's presence)

DATE 5-15-18

SIGNED [illegible] M.D.
MEDICAL EXAMINER

Def's Exh C (Cont)

SEE REVERSE SIDE

DEFENDANT'S EXHIBIT O

The Interlake Steamship Company

HEALTH EXAMINATION

STEAMER D.O. Mills

NAME Stephen A. Sulentech OCCUP. Coal passer YRS. MARINE SERVICE Since July 11, 1953

AGE	SEX	HEIGHT	WEIGHT	RACE	WHERE BORN

PAST HISTORY: HAVE YOU HAD ANY OF THE FOLLOWING? IF SO, WHEN?

						CLASSIFIED
TUBERCULOSIS	no	BACK PAIN	no	VENEREAL DISEASE	no	
ARTHRITIS OR RHEUMATISM	no	STOMACH TROUBLE	no	OPERATIONS	tonsillectomy & adenoidectomy in childhood	B
FITS OR CONVULSIONS	no	SPITTING OR PASSING OF BLOOD	no	INJURIES	no	
MENTAL OR NERVOUS DISEASE	no	MALARIA, TYPHOID OR DYSENTERY	no	OTHER AILMENTS	no	CHECK HERE IF DISQUALIFIED % ACTIVE COMMUNICABLE DISEASE
RUNNING SORES	no	DIABETES	no			

HAVE YOU BEEN REJECTED OR DISCHARGED FROM MILITARY SERVICE? no WHY?

HAVE YOU EVER RECEIVED OR APPLIED FOR COMPENSATION FROM ANY SOURCE FOR SICKNESS OR ACCIDENT? no

HEAD NECK	negative	EYES	normal
NOSE	normal	Without glasses R. 20/30 L. 20/30	R. 20/30 L. 20/30
TEETH	normal	With glasses R. 20/20-1 L. 20/20	R. 20/20-1 L. 20/20-1
MOUTH	normal	COLOR BLIND	no
THROAT	tonsils removed	EARS	normal
HEART	normal	Hearing R. 36/36 L. 36/36	
BLOOD PR.	100/60 PULSE 88	LUNGS	clear
ABDOMEN	negative		
		GENITO URINARY	small external hemorrhoid
DEFINITE HERNIA	no POTENTIAL HERNIA no		
		WASSERMAN	
NERVOUS SYSTEM	normal	SKIN	normal
		VACCIN. SCAR	yes
UPPER EXTREM.	normal	LOWER EXTREM.	Varicose veins-moderate-right leg.

URINALYSIS Sp. Gr. 1.020 Reac. acid Alb. neg. Sug. neg.

SCARS, BIRTH MARKS OR OTHER MEANS OF IDENTIFICATION: Scar inner aspect of right leg.

PRESENT DISEASES AND DEFECTS FOUND

Varicose veins-right leg-moderate-advise vanous ligation of same.
Small external hemorrhoid—advise regulation of bowels & diet for same.

I hereby certify I have disclosed all previous sickness and injuries and that I am in good health. I also authorize the examining physician to send this report to the employer.

Stephen A. Sulentech
Signature
To be signed in examining physician's presence

DRS. CASTLE RAMSEY CASTLE & ASSOC.

DATE 8-15-53 SIGNED R. Ramsey M.D.
MEDICAL EXAMINER

SEE REVERSE SIDE

OCT 25

In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 407.

STEPHEN A. SULENTICH,

Petitioner,

vs.

THE INTERLAKE STEAMSHIP COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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ROBERT G. McCREARY, JR.,
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Cleveland 14, Ohio,
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The opinion of the District Court denying Petitioner's motion for a new trial and denying Petitioner maintenance and cure (R. 496-500) was not reported and is printed herewith (Appendix 1).

The Findings of Fact and Conclusions of Law entered by the District Court were not reported and are printed herewith (Appendix 2).

The opinion of the Court of Appeals is reported at 257 F. 2d 316 and is printed in the petition (Appendix A. p. 5a).

Denial of Petitioner's petition to the Court of Appeals for rehearing was without opinion.

JURISDICTION.

The jurisdictional requirements are accurately set forth in the petition.

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JURISDICTION.

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QUESTIONS PRESENTED.

The statement of "Questions Presented" contained in Petitioner's brief (p. 2) does not accurately reflect the issues tendered below. We believe the questions presented must, in fairness, be restated as follows:

1. This Court has held and lower courts have followed the rule that one who procures his employment by deliberate fraud in regard to employment physical examination is not, as of right, an employee entitled to sue for a subsequent injury provided that his fraud was material and substantially affected the examining doctor's conclusion that he was in acceptable physical condition. Were the lower courts correct in holding that this rule applied when the employment physical examination at which the fraud was practiced occurred after the person had started to work, but before the alleged injury and where it was shown that the employment was expressly subject to passing of such examination, that such examination was held as soon as practicable, and that the employer relied upon such examination?

2. When it was shown that under the evidence the instructions given the jury on the issue of negligence were adequate and that in regard to other alleged incidents of negligence there was no evidence to support them or no offer to prove them and no instructions requested to submit them, was the Court of Appeals correct under decisions of this Court in holding that the case was submitted in proper form to the jury?

3. When Findings of Fact dispositive of the claim were made by the trial court sitting in admiralty without a jury and on appeal from such judgment and from a judgment on the jury branch of the case such findings were not challenged at all, was the Court of Appeals cor-

rect in affirming the non-jury case without review and deciding the question of law common to both appeals in its review of the jury case?

STATUTES INVOLVED.

The statutes involved are the Jones Act (38 Stat. 1185, 46 U. S. C. § 688) and the Federal Employers' Liability Act (35 Stat. 65, 45 U. S. C. § 51, § 55), both printed in the petition (Appendix A, p. 1a).

Petitioner states that a treaty is involved, the Shipowners Liability Convention (54 Stat. 1693) printed in the petition (Appendix A, p. 3a) but respondent contends that said treaty is not involved. It was never urged in the trial court and was not raised in the Court of Appeals until after oral argument and then by means of a supplementary brief, leave to file which was denied.

STATEMENT.

THE ALLEGED ACCIDENT.

Petitioner had gone to college and had graduated from law school. He went on the Steamer MILLS in July of 1953 so he could study for a bar examination and work at the same time (R. 56).

He was assigned as a coalpasser and as such stood two 4-hour watches in every 24 hour period. Coal was conveyed from the coal bunkers to the furnace by automatic stokers. Petitioner assisted the fireman by shoveling ashes into a hole on the deck from which the ashes were automatically conveyed over the ship's side into the water.

There were no eye witnesses to the accident claimed by Petitioner. He said that on August 17, 1953, he was going down a stairway from the engine room to the crank room carrying a mop pail in one hand and when about

half way down slipped on a tread and fell, injuring his back.

The treads of the stairway were solid metal and each was covered by an abrasive safety pad which Petitioner testified reached to a point 1" to 2" from the edge of the step (R. 64). He testified that the abrasive material was wet and oily (R. 65) and that the edges of the treads were worn down so that they were smooth and shiny (R. 63).

The engineer on watch heard a noise as if something metallic had fallen, went to the top of the stairs and saw Petitioner lying against the stairs (R. 450). Petitioner got up himself and the engineer went down and talked to him (R. 451)—he said he had slipped on the stairs. The engineer examined the treads, saw they were in good condition (R. 451) and that the steps were dry (R. 451).

The oiler on watch (who was called as a witness for Petitioner) used the stairway about a dozen times during the watch and admitted he noted nothing unusual about the stairs. The treads looked good (R. 430)—he didn't see any bad treads on there (R. 431).

All witnesses except Petitioner testified that the non-skid safety pads on the treads extended to a point ¼" to ⅛" from the edge of the treads (R. 430, 451).

PETITIONER'S PREVIOUS HISTORY OF BACK TROUBLE.

Following the alleged accident of August 17, 1953, Petitioner's condition was diagnosed as a herniation of lumbar discs 4-5 (R. 428).

Petitioner told the doctor who treated him in Duluth following the alleged accident that he had had no back trouble previous thereto (R. 427). He told the same thing to the U. S. Public Health Service doctor who next treated him, that he never had any back trouble before August 17, 1953 (R. 469, 494).

As early as 1942 Petitioner had a post-operative diagnosis of possible herniated disc (R. 486) and in 1950 a definite diagnosis of ruptured disc lumbar 4-5 had been made (R. 482), the same place as after the alleged accident.

Actually at the time of the alleged accident Petitioner was receiving compensation based on a 30% disability of the back. He had been discharged from Military Service because of back trouble.

Petitioner's "long history of chronic back trouble" is detailed in the Trial Court's Finding of Fact 2 (Appendix 2, p. 24, *infra*).

PETITIONER'S FRAUD.

In April, May and June of 1953 Petitioner was having back pain and was receiving treatments therefor. In July he joined the Steamer MILLS at Two Harbors, Minnesota.

The navigation season on the Great Lakes is restricted to the period from early spring to late fall. Before the MILLS sailed in the spring of 1953, respondent arranged for physical examinations of the entire crew in order to determine their fitness for employment.

During the course of the navigation season there was some change of personnel--a seaman may leave his ship on short notice or no notice at all and a replacement must be found (or sought) in a short time because vessels such as the MILLS are ordinarily never in port more than a few hours.

Physical examinations of those seamen joining vessels after the opening of navigation were conducted aboard ship on respondent's behalf by a doctor stationed at the Port of Duluth, Minnesota. Duluth is the most frequented port on the Great Lakes for vessels in the iron ore trade and was visited by the MILLS on the average of twice a

month. If the doctor found a seaman unfit for employment he notified the captain of the vessel, who then paid the seamen off and gave him his fare home (R. 296, 440).

Upon coming aboard ship a seaman signs the Ship's Articles. Petitioner signed Articles on the Steamer MILLS on two occasions (R. 203, 441). The Articles provided in substance that employment was subject to health examination by a physician furnished by the vessel and that in case any crew member failed to pass such examination his employment would cease (Finding of Fact 1, Appendix 2, p. 24, *infra*).

It so happened that after Petitioner joined the Steamer MILLS she did not receive orders for loading ore at Duluth until August 15, at which time the examining doctor came aboard and conducted a physical examination of Petitioner and several other seamen who had recently joined the ship. Previous to actual physical examination the doctor asked in substance the following questions among others provided for in the Health Examination Report, and Petitioner gave the following answers (R. 307):

> "Q. Have you ever had back pain?
>
> A. No.
>
> Q. Were you ever rejected or discharged from Military Service and, if so, why?
>
> A. No.
>
> Q. Did you ever receive compensation from any source for sickness or accident?
>
> A. No."

Petitioner then signed the examination reports in the following form (R. 308):

> "I hereby certify that I have disclosed all previous sickness and injury and I am in good health. I also authorize the examining physician to send this report to the employer.
>
> /s/ Stephen A. Sulentich."

On this subject Petitioner testified as follows (R. 212, 214):

"Q. And at the time you were taking that examination, Mr. Sulentich, you knew that you had had previous pain in your back before you ever came aboard-ship?

A. Yes.

Q. And you knew that you had injured your back at Reliance Electric Company?

A. I had a strained condition there, yes, muscle

* * * * *

Q. You knew, however, Mr. Sulentich, that over a long period of time—and I am speaking of your knowledge at the time you were having this physical examination—that you had received medical treatment for your back from the Veterans Administration?

A. Yes, I did.

* * * * *

"Q. And you knew furthermore that you were receiving a compensation from the Veterans Administration based on a thirty percent disability?

A. That is right.

Q. And you knew further that you had had attacks of back pain and diathermy and medication for this condition as recently as April, May and June of that year?

A. Well, I had it that year, but I do not know exact dates; treatment, yes.

Q. Now, did you disclose any of these conditions to the examining doctor?

A. No. I did not."

Since Petitioner gave no history of back trouble the doctor did not conduct a rigid examination of his back (R. 298, 310) and on the basis of the minor defects found he was rated "B" or fit for employment.

However, if Petitioner had disclosed in substance the true facts concerning his history of back trouble, the examining doctor stated that he would have rated him "D" or unfit for employment and would have brought about his immediate discharge from the ship (R. 315, 316, 296, 440).

DISPOSITION IN THE LOWER COURTS.

Jury trial of the Jones Act claim commenced March 7, 1957 and resulted on March 22 in a verdict for respondent.

Three main issues were put to the jury: (1) Was Petitioner injured at all on the Steamer MILLS? (R. 394, 401); (2) Was Respondent negligent? (R. 395, 396); and (3) Was Petitioner's employment invalidated prior to the date of the alleged accident because of fraud? (R. 397).

On May 13, 1957, a hearing was held before Judge Barnes, without a jury on Petitioner's claim for maintenance and cure and such claim was denied in an oral opinion (Appendix 1, *infra*, p. 19) on the grounds that:

(1) Petitioner sustained no injury aboard the Steamer Mills (Finding of Fact 7, Conclusion of Law 2, Appendix 2, *infra*, p. 26).

(2) Petitioner's employment on and after August 15, 1953 was procured through fraud and misrepresentation and was, therefore, void (Finding of Fact 6, Conclusion of Law 1, Appendix 2, *infra*, p. 26).

The Court of Appeals unanimously affirmed, holding in respect to the questions now sought to be certified that:

(1) The judgment of the Trial Court on the maintenance and cure count is affirmed for the reason that the Petitioner did not challenge its basis in his appeal briefs.

(2) The instructions submitted to the jury on the question of Petitioner's fraud contained all of the essential elements necessary to warrant a finding under respondent's affirmative defense, was a correct statement of the law, and was properly given under the evidence in the record.

(3) The instructions submitted to the jury on the question of negligence were sufficient under the evidence in the record, and since the Trial Court did not withdraw from the jury any issue of negligence properly tendered by Petitioner under Rule 51 F. R. C. P., the doctrine of the *Rogers* case, 352 U. S. 500, was not involved.

(4) Petitioner had a fair trial free from prejudicial error.

ARGUMENT.

No review is warranted. The holding of the lower courts regarding the effect of Petitioner's deliberate fraud is consonant with decisions of this Court and with *all* decisions of lower federal courts rendered since the time of this Court's decisions. Petitioner's statement that issues of negligence were improperly withdrawn from the jury is flatly contradicted by the holding of the Court of Appeals that all issues of negligence tendered by Petitioner were submitted to the jury. Finally, since the Trial Court based its denial of maintenance and cure on the independent Finding of Fact that Petitioner was not injured aboard the Steamer MILLS (as well as on the ground that his employment was invalidated by fraud), and since Petitioner failed to show on appeal that such fact finding was "clearly erroneous" (or indeed to challenge such finding at all), the Court of Appeals was correct in affirming the judgment.

Further, Petitioner fails to make out a case of general importance justifying review by this Court. Although the

alleged accident was commonplace, the background thereof was most unusual, if not unique, and unlikely to occur again. We submit it is not a recurring problem in the administration of justice, on land or sea, that a law student suffering from back trouble diagnosed as herniated disc for which he is receiving compensation based on a 30% disability decides to continue his law studies aboard ship and to work at the same time, and while aboard deliberately conceals his true physical condition from an examining doctor, and then allegedly (but unwitnessed) has a fall in which the only injury found is the self-same herniated disc, the past history of which he then proceeds to conceal from the doctors who treat him.

UNIFORMITY OF DECISION IS NOT DISTURBED BY THE HOLDINGS BELOW ON THE EFFECT OF PETITIONER'S FRAUD.

The Court of Appeals held that the instruction submitted by the trial judge to the jury (Appendix 3, herein) correctly stated the law, contained all the necessary elements to warrant a finding under respondent's affirmative defense and was properly given under the evidence. This holding is directly supported by this Court's decision in *Minneapolis R. Co. v. Rock*, 279 U. S. 410 (1928) as explained in *Minneapolis R. Co. v. Borum*, 286 U. S. 447 (1932), where it was held that "one who procures his employment by fraud is not entitled to the benefits of the Employers' Liability Act * * * providing the false statement was of such character that it 'substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition.'" *Southern Pacific Company v. Libbey*, 199 F. 2d 341, 348 (C. A. 9—1952), which statement of law was approved in *Casso v. Penn. R. R. Co.*, 219 F. 2d 303, 304 (C. A. 3—1955), and

applied in *Talarowski v. Pa. R. R. Co.*, 135 F. Supp. 503 (D. C. Del.—1955).

Plaintiff in the *Rock* case, *supra*, was, of course, an imposter, having hired a substitute to take the physical examination for him, but that the Court did not mean to rest its ruling in that case on such a narrow footing is made clear by the opinion in the *Borum* case (*Minneapolis R. Co. v. Borum*, 286 U. S. 447 (1932) *supra*). It was on the question of the *materiality* of the fraud *not the manner in which the fraud was practiced* that the *Borum* case turned and which distinguished it from the *Rock* case. Justice Butler, who wrote the opinion in both cases, held in the *Borum* case, "defendant could not have regarded the difference between plaintiff's actual age and that stated in his application as having any *material* bearing upon the physical condition it required" (286 U. S. 450) and that "the evidence does not show that plaintiff's false statement of his age substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition, or that if he had given his real age the surgeon would have found otherwise" (286 U. S. 450); and that "Plaintiff's physical condition was not shown to be such as to make his employment inconsistent with the defendant's proper policy or its reasonable rules to insure discharge of its duty to select fit employees." (286 U. S. 451.)

By way of contrast, in order to show the materiality of the misrepresentation in the *Rock* case, Justice Butler referred to the following language from his earlier opinion: "While his (Rock's) physical condition was not a cause of his injuries, *it did have direct relation to the propriety of admitting him to such employment* * * *." (286 U. S. 450.)

These decisions make clear that the only test of materiality is whether the misrepresentation affected the

examining doctor's conclusions that the man was in acceptable physical condition. In our case the trial court applied this test and submitted to the jury the issue of materiality of plaintiff's misrepresentation (R. 397), a point clearly emphasized in the Court of Appeals' opinion (259 F. 2d p. 320).

While the requirement intimated in the annotation 136 *A. L. R.* 1125 cited at p. 9 of Petitioner's brief that there be a causal connection between the previous condition and the injury sustained goes beyond the requirements laid down by this Court in the *Rock* and *Borum* cases, it is clear that in the present case the existence of a causal relationship between Petitioner's physical condition prior to the alleged accident and his condition thereafter, was established as an undisputed fact; indeed the conditions were identical as pointed out in our Statement herein, *supra* (pp. 4-5). Even the doctor who testified for Petitioner admitted he had a vulnerable and weak back likely to be injured again (R. 435) and his counsel so stated to the jury (R. 496).

Petitioner cites the discredited case of *Payne v. Daugherty*, 283 Fed. 353 (C. A. 8—1922) in support of his contention that it must be shown that the concealed condition caused the *accident*, that there can be no *retroactive* dissolution of the employment, and that to condition employment upon the successful passing of a health examination is a violation of Sec. V of the Federal Employers' Liability Act, Title 45 U. S. C. A. § 55. As shown by the opinion of the dissenting judge, the *Daugherty* decision states a most extreme position, a position which must be regarded as rejected by this Court in view of the fact that the lower court in the *Rock* case (*Rock v. Minneapolis R. Co.*, 247 Ill. App. 600—1928) rested its decision in favor of Rock principally on the *Daugherty* case and was re-

versed by this Court (279 U. S. 410—1928). No federal court has ever followed the *Daugherty* decision.

In neither the *Rock* nor *Borum* cases did this Court rule that the concealed condition must be a cause of the accident--such a rule is devoid of logic since it renders the element of fraud superfluous. Nor in these cases did this Court rule that conditioning employment upon the passing of a health examination is a violation of Sec. V. On the contrary this Court in the *Borum* case gave such a requirement its approbation, referring to "defendant's proper policy or its reasonable rules to insure discharge of its duty to select fit employees" (286 U. S. 451), a public purpose as important to be served in shipping as in railroad operations.

Clearly such a requirement does not, as Sec. V would prohibit, exempt the employer from liability; instead, it is the fraudulent evasion of such requirement by the employee which invalidates the employment contract and thus disqualifies him from invoking liability, since he must be an employee to bring suit either under the Jones Act (*Cosmopolitan Company v. McAllister*, 337 U. S. 783—1948), or under the general maritime law for maintenance and cure (*Fink v. Shepard Steamship Co.*, 337 U. S. 810—1948).

In the event of such fraud the employment relationship is not, as Petitioner argues, dissolved *retroactively*—rather, the employment is invalidated as of the date of the material fraud, as the jury here was correctly charged (Appendix 3). There were sound practical reasons shown by the evidence why physical examinations could not be arranged immediately upon a seaman's joining a Great Lakes vessel, and the only relevance of such circumstance as regards the validity of the defense of fraud was whether respondent in fact *relied* upon the misrepresentations of

Petitioner at the health examination, an issue which was also squarely put to the jury by the instruction given (Appendix 3).

The Shipowners Liability Convention is now cited by Petitioner (Petition, p. 8) but was not invoked in the trial court nor in the Court of Appeals until after oral argument. It applies to "navigation on the high seas only." Parts of the Great Lakes have been excluded from the definition of "high seas," *Bigelow v. Nickerson*, 70 F. 113 (C. A. 7—1895), and the only enabling legislation initiated by Congress in regard to the Convention, H. R. 6881, 76th Congress, First Session, expressly excluded the Great Lakes from its operation. Thus Petitioner failed to establish that the Convention applied at all to the *locus in quo* of the alleged accident.

Moreover, the Convention applies by its terms only to the remedy for maintenance and cure and Petitioner failed to show, as required by Article 2 thereof, that he suffered an "injury occurring between the dates specified in the Articles of Agreement for reporting for duty and the term of the employment." On the contrary, in a holding which was dispositive of the maintenance and cure claim, the trial court found that Petitioner was not injured on the Steamer MILLS. In any event, as shown by *Warren v. U. S.*, 340 U. S. 523 (1951) the Convention was not intended to define American standards of liability with particularity, nor was it "designed to adopt a more strict standard of liability than that which our maritime law provides" (340 U. S. 527). In short, the Convention neither adds to nor detracts from the existing law of the United States on the subject and so is irrelevant in this proceeding.

ALL ISSUES OF NEGLIGENCE TENDERED BY PETITIONER WERE PUT TO THE JURY.

Petitioner distorts the opinion of the Court of Appeals when he says that, in effect, it held that "it is proper to refuse to grant a jury trial on some issues, albeit there be evidence to support them (Petition p. 10).

Actually the Court of Appeals held (257 F. 2d p. 322) that "Under the evidence in this record [the instructions given on the issue of negligence] were adequate"; "Every instruction actually tendered by plaintiff was "given" or, if not, that "plaintiff did not object in compliance with Rule 51 of the Federal Rules of Civil Procedure"; and that since the Trial Court denied defendant's motion for a directed verdict "and submitted the case to the jury for its determination," the decisions in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500 (1957), and *Ferguson v. Moore-McCormack Line, Inc.*, 352 U. S. 521 (1957) "are not even remotely analogous."

Petitioner's testimony as to the cause of the alleged accident (Statement, *supra*, p. 4), leaves no doubt that the sole question for the jury was the condition of the stairs. If the treads were defective or slippery and this condition caused Petitioner to fall, then under the instructions given (257 F. 2d p. 322), respondent was negligent no matter what brought about the condition. No other ultimate questions of fact were presented for the jury's consideration on the issue of negligence.

Petitioner argues that evidence was *offered* that "Other ships have grated steps to carry off water"; that is, "proof of safer methods" (Petition, p. 11), but this argument is not available to Petitioner here because the Court of Appeals found (257 F. 2d p. 321), in its reference to the witnesses Eckert and Merchant and to the rejected photograph (Plaintiff's Ex. 3) that no proper foundation

for such an offer of proof was ever made. Such evidence even if proved was, we contend, clearly irrelevant in the circumstances, but the Court of Appeals found it unnecessary to consider the question because of failure of proof.

Petitioner also argues, citing only the exhibit found by the Court of Appeals to be inadmissible (Petition, p. 11, Plaintiff's Ex. 3) that an issue of negligence was presented because, so his counsel alleges, the handrail did not run the length of the stairway. This argument was not presented to the Court of Appeals and Petitioner hides from this Court the fact that by his own testimony he fell when he was *halfway* down the stairway and at a time when he was holding onto the handrail (R. 66). As to this spurious issue the Trial Court said "There wasn't a scintilla of evidence about that * * * you didn't bring it into the case" (Transcript 1669), and as pointed out by the Court of Appeals, no instruction was ever requested by Petitioner on the issues of negligence which were refused, or if refused, objected to pursuant to Federal Rule 51.

Contrary to Petitioner's statement (Petition, p. 12) evidence that one oiler and one engineer (not two engineers as stated by Petitioner) were temporarily absent from the ship *was* submitted to the jury. But this was an evidentiary rather than an ultimate fact—it had no relevance except as to the condition of the stairway, a subject fully covered by the Court's instructions. On this, Petitioner glibly says that the vessel was unseaworthy because undermanned, but this he never claimed before now, and the statement cannot be true so long as the vessel was manned up to Coast Guard requirements, which she was, as Petitioner knows. Once again this supposed issue was not covered by any requested instruction and was not argued in the Court of Appeals.

The jury could not have a commission to find negligence without a warrant in the evidence, and no such warrant existed or was even sought beyond the instructions which were given.

SINCE PETITIONER FAILED TO CHALLENGE THE TRIAL COURT'S FINDING THAT HE WAS NOT INJURED ON THE MILLS, NO BASIS FOR REVIEW WAS PRESENTED.

At the conclusion of the hearing of Petitioner's claim for maintenance and cure, the Trial Court in its oral opinion said "I am sure he didn't sustain the burden of proof with respect to his injuries * * *" (Appendix 1); and he so found as a fact (Finding of Fact 7, Appendix 2) and for this independent reason denied Petitioner maintenance and cure (Conclusion of Law 2, Appendix 2).

This Court in *McAllister v. U. S.*, 348 U. S. 19 (1954) stated at p. 20:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunal in admiralty cases than that exercised under Rule 52(a) of the Federal Rules of Civil Procedure * * *. A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'"

Since Petitioner did not challenge the fact findings of the Trial Court *at all* he obviously presented no basis for a holding by the Court of Appeals that such findings were "clearly erroneous." Such failure to present *any* basis for reversal of a finding of fact was a fundamental defect and was not a mere technical omission in brief writing

as Petitioner pretends (Petition, p. 13). Thus under the rule of the *McAllister* case, the Court of Appeals was correct in affirming the judgment on Count II.

It could also be pointed out that Petitioner did not challenge, as required under the *McAllister* rule, the finding of the Trial Court that his employment on and after August 15, 1953 was procured through fraud (Finding of Fact 6, Appendix 2) which afforded an additional reason for denial of maintenance and cure (Conclusion of Law 1, Appendix 2) but the Court of Appeals instead of holding, as well it might have, that the judgment on the maintenance and cure count was *res judicata* of Petitioner's right to recover under the Jones Act, granted him a review of all errors alleged to have arisen out of the jury proceedings, including the question of the effect of Petitioner's fraud. The latter question was fully considered by the Court of Appeals and was decided adversely to Petitioner, correctly so we maintain, and thus Petitioner's claim that the Court of Appeals wrongfully limited its review is without substance.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

HARLAN L. HACKBERT,
208 South La Salle Street,
Chicago 4, Illinois,
Attorney for Respondent.

ROBERT G. MCCREARY, JR.,
Of Counsel.

APPENDIX 1.

Opinion of the District Court Denying Petitioner's Motion for a New Trial and Denying Petitioner Maintenance and Cure.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable John P. Barnes, Chief Judge of said Court, in his court room in the United States Court House at Chicago, Illinois, on Monday, May 13, 1957, at 10:00 o'clock p.m.

APPEARANCES:

JAMES A. DOOLEY, ESQ.,
on behalf of Plaintiff;

HARLAN L. HACKBERT, ESQ., and
ROBERT G. MCCREARY, JR., ESQ.,
on behalf of Defendant.

And thereupon the following proceedings were had herein:

* * * * *

By the Clerk: Sulentich vs. Interlake Steamship Company, plaintiff, motion for a new trial and for trial on maintenance and cure.

By the Court: When was this case?

By Mr. Dooley: I think it concluded on March 22nd.

By Mr. Hackbert: It started about the third.

By the Court: All right. Go ahead.

It started March 8th.

* * * * *

By the Court: On the motion for the new trial, I have just reviewed my diary, and I find that we spent a little more than twelve full days, covering fourteen days, in the trial of this case.

During that time the Court and the jury had full opportunity to observe the plaintiff. He was not a bad looking man, but the jury came to a conclusion that he was not entitled to recover. The Court came to that same conclusion. Maybe the jury and the Court heard too much about him in the fourteen days he was here, twelve days in the fourteen days or parts of fourteen days. I say it was not because he was a bad looking man that I came to the conclusion I did, and I assume it was not because he was a bad looking man that the jury came to the conclusion they did, because he was not a bad looking man.

We just came to the conclusion he had a very bad back before he signed up with the defendant, and the jury probably came to the very strong suspicion that he went up there and signed up, with the deliberate purpose of getting hurt. He had had a bad back since he was a young man, a very young man. That bad back had stayed with him throughout his life.

He had job after job and he kept them a very short time, and his work generally was of a light nature.

He was in the Army seven months, and most of that time in hospitals because of his back.

When he came out of the Army he very promptly applied for compensation, and he got it, ten per cent at first, and later thirty per cent, because of his bad back.

He had had some formal, or he had had opportunities, I will put it, for a formal education. He had attended, I think, a technical school in East Tennessee, but whether the record shows he was graduated I do not now remember.

He had attended a law school and had been graduated therefrom, but had not been admitted to the bar.

He knew his rights, there isn't any question about that.

I think he committed a fraud on the defendant when he signed up with them.

Now, my recollection is, that the physician who first examined plaintiff some weeks after he first signed up left some blanks on the report of that examination. It was testified, and proved to my satisfaction, at any rate, that it was the custom of that physician to leave blanks if the answers were negative to those questions.

On top of that the plaintiff testified that at the time of the physical examination by this Dr. Schuman he signed the report and said, "I hereby certify I have disclosed all previous sickness and injuries, and that I am in good health. I also authorize the examining physician to send this report to the employer."

That is signed by the plaintiff.

Now, then, the practice of this examining physician with respect to leaving blanks indicating a negative answer was supported further by the testimony of his employer, who testified that was the practice of the examining physician, and he produced a large number, perhaps twelve, counsel says, other reports, not for the purpose of proving the truth of anything therein stated, but only for the purpose of proving the practice of the examining physician with respect to the negative answers.

I am satisfied that the plaintiff did commit a fraud on the defendant. Having come to that conclusion, you don't have to take to much of a step to think that he probably planned the whole thing. If you do, you doubt whether he had an accident, the accident he claims to have had, slipping on a stairway.

The evidence shows with respect to that that if he slipped as he claims he slipped on a quarter of an inch of the edge of that step, because the rest of it was covered with an abrasive.

He did have two disks removed. I don't know what else he wants to have; he probably wants to have some vertebras fused or something of that nature, and probably some screws put in his back. That is what they usually want.

Unquestionably he has a bad back, but I don't think the defendant is responsible for it. Probably the athletics he indulged in in his youth were responsible, and maybe his build. It is unfortunate, but I cannot see any reason why the defendant should be blamed for it.

I can't see any reason why fraud, any reason in the nature of things why fraud should not void any contract into which it enters, even if it is a contract of employment. If anybody can point out to me a good reason why that sort of contract should be exempted from the effects of fraud I will be glad to hear it.

These questions and all the other matters suggested by Mr. Dooley, except the question of something going to the jury, were considered at length during the trial of the case from time to time, and the Court then did the best he could with the questions in the light of the education given him by counsel.

The Court doubtless made some mistakes. I think it would be a miracle if the Court didn't during the course of twelve days, make some mistakes, but I don't think any of them are prejudicial.

I cannot remember about a transcript going to the jury. As I remember, there was a complaint offered and received,—a complaint in the case, so far as the evidence showed, the first personal injury case this plaintiff had, wherein the plaintiff through his counsel complained of a back injury. I think, I am not sure but I think there was a transcript of the plaintiff's evidence in that case received.

Is that the fact?

By Mr. McCreary: That is right, your Honor.

By the Court: That was the transcript of the testimony of the plaintiff.

If I did let it go to the jury I cannot see what would be prejudicial about that. That was the plaintiff's testimony of what happened to his back back there in his early young manhood. If I let the complaint go to the jury I don't see how they would be prejudicial. There in the most solemn manner a man can state he stated through his counsel he had been injured in a number of ways.

I am satisfied that the plaintiff committed fraud upon the defendant by failing to disclose his physical condition. I do not think he sustained the burden of proof on the question of negligence on the part of the defendant. I am sure he didn't sustain the burden of proof with respect to his injuries, and I do not think that there is or that there was error committed which was prejudicial to the plaintiff.

Now, having come to the conclusion I have, on the motion for the new trial I am not going to cast doubt on the jury's thinking.

It may be assumed the jury said there was no negligence on the part of the defendant or may have said that the plaintiff was not injured. Again, it may have said he committed fraud in the employment contract, or it may have said all of those things—I am not going to cast doubt on any one of them by making allowance for maintenance and cure.

I am sure he committed fraud. Accordingly, there will be no allowance for maintenance and cure.

You may bring in findings of fact, conclusions of law and a judgment order.

* * * * *

APPENDIX 2.

Findings of Fact and Conclusions of Law of the District Court.

The Court now makes the following Findings of Fact and Conclusions of Law in regard to the Second Cause of Action alleged in plaintiff's complaint:

1. On July 11, 1953 plaintiff signed Articles of Agreement aboard defendant's Steamer D. O. Mills whereby it was agreed that his employment was subject to health examination by a physician furnished by the vessel and that in case he failed to pass such examination his employment would cease.

2. Prior to going aboard the Steamer Mills plaintiff had a long history of chronic back trouble accompanied by the medically recognized signs and symptoms of a herniated disc, which history included the following events:

(a) In 1941 plaintiff injured his back while high-jumping as a student at Tennessee Tech. He again injured his back in 1941 while working at American Steel & Wire Company in Duluth;

(b) In 1942 he injured his back while working at Reliance Electric Company, Cleveland, Ohio;

(c) He was inducted into the United States Army on September 23, 1942 and received a medical discharge therefrom on May 12, 1943 because of chronic low back and sciatic pain, 6 months of his 8 months service being spent in Army Hospitals because of back pain;

(d) On June 23, 1943 plaintiff applied to the Veterans Administration for disability compensation because of continuing back pain and began to receive compensation based first on a 10% disability and later, commencing on September 29, 1950 when his condition was diagnosed as a ruptured intervertebral disc,

based on a 30% disability, which compensation plaintiff continued to receive while he was aboard the Steamer D. O. Mills in 1953;

(e) Plaintiff had numerous jobs between 1943 and 1953, mostly of a clerical nature, a number of which he gave up because of back trouble and during none of which he was entirely free of back pain;

(f) During the 10 year period prior to going aboard the Steamer Mills, plaintiff requested and received numerous examinations and treatments from Veterans Administration doctors and treated himself at home with a heat lamp because of pain in his low back and legs. On September 29, 1950 his condition was diagnosed as a ruptured intervertebral disc, he continued to have back pains and treatment therefor periodically throughout 1951 and 1952 and in April, May and June of 1953 he was having back pain and was receiving heat treatments therefor both from the Veterans Administration and by himself at home.

3. On August 15, 1953 plaintiff received a physical examination aboard the said Steamer D. O. Mills at which time in response to direct questions by the examining doctor he knowingly denied having had any history of injuries, back pain, discharge from Military Service or receipt of compensation from any source because of sickness or accident. Further, although plaintiff did not disclose any previous injuries, he knowingly signed the examination report in the following form:

"I hereby certify I have disclosed all previous sickness and injuries and that I am in good health. I also authorize the examining physician to send this report to the employer.

/s/ Stephen A. Sulentich Signature"

4. Plaintiff attended college and had graduated from law school although he had not been admitted to the Bar.

5. The concealments and misrepresentations by plaintiff from and to the examining doctor on August 15, 1953 were knowingly made, were material to the risk of physical disability during employment on said vessel and were relied upon by defendant, and plaintiff would not have been permited to remain aboard the vessel after August 15, 1953 if the true state of facts had been disclosed by him to the examining doctor.

6. Defendant, The Interlake Steamship Company, has sustained the burden of proving that plaintiff's employment on and after August 15, 1953 was procured through his fraud and misrepresentations.

7. Plaintiff has failed to sustain the burden of proving that he was injured aboard the Steamer D. O. Mills on August 17, 1953.

CONCLUSIONS OF LAW.

1. Plaintiff's employment on and after August 15, 1953 was null and void and of no effect and he is, therefore, barred from any claim for maintenance and cure as asserted in his complaint.

2. Plaintiff sustained no injury on August 17, 1953 and, therefore he is not entitled to any maintenance and cure as asserted in his complaint.

3. The complaint is dismissed.

/s/ JOHN P. BARNES,
Chief Judge.

May 20, 1957.

APPENDIX 3.

Instruction Submitted by the Trial Court to the Jury.

If you believe from the preponderance of the evidence (1) that as one of the terms and conditions of his initial employment on July 11, 1953, the plaintiff's employment was subject to a health examination, and in case he failed to pass such examination, his employment should cease; (2) that upon the health examination on August 15, 1953 the plaintiff knowingly misrepresented to or concealed from the examining physician the fact that he had sustained previous injuries and suffered back pain, or that he had been discharged from the military service for physical disability or that he had been and was then receiving veteran's disability benefits based on a rating of 30% disability; (3) that such misrepresentation or concealment was material; and (4) that such misrepresentation or concealment was relied upon by the defendant, and that plaintiff would not have been permitted to continue to work and remain aboard the vessel if the true state of facts had been disclosed by him, then plaintiff was not as a matter of right defendant's employee on August 17, 1953 at the time of his alleged accident, and he is not entitled to recover under the statute under which this action is brought, and you should find the defendant not guilty. You are further instructed that the burden of proof is upon the defendant to prove by the preponderance of the evidence each of the four above mentioned elements.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 407

STEPHEN A. SULENTICH,
Petitioner,

vs.

THE INTERLAKE STEAMSHIP COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY.

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The Importance of Certiorari Here.

Respondent overlooks the real issue. It is whether, in a master and servant action under the Federal Employers' Liability Act or the Jones Act, an employer can by contract determine the status of the employee, and in the event of injury allege that the servant was not an "employee" because of allegedly frauduient misrepresentations made after he had entered upon his master's work. It likewise overlooks the issue as to whether or not the alleged fraud must be causally related to the injury.

Minneapolis Etc. R. Co. v. *Borum*, 286 U. S. 447, does not enunciate the proposition for which Respondent contends. On the contrary, this Court said at p. 449 of that decision:

> "*Neither his age nor his physical condition contributed to cause his injury.*" (Italics ours)

This case involves not only Sulentich. It concerns every injured servant seeking a remedy under two important federal statutes, the Federal Employers' Liability Act and the Jones Act. It is this type of case which today constitutes much of the litigation on the law side of the civil docket in both federal and state courts.

But there is more. There is that encroachment upon the function of the jury so classically demonstrated when a court states that it can with propriety direct a verdict on certain charges of negligence, albeit they are supported by evidence, and that the holdings of this court concerning the function of court and jury not only refer to situations wherein a verdict is directed on all charges.

Respondent does not meet the obvious conflict between the opinion in this case, the decisions of other Courts of Appeals and this Court.

It cannot be denied that:

a. This opinion is contrary to *Payne* v. *Dougherty*, 283 F. 383 (1922) which, in accord with the vast number of cases in 136 ALR 1125, state the test of the defense of fraud in obtaining employment is whether there is a causal connection between the injury and the misrepresentation. It is at loggerheads with *Casso* v. *Penn. R. Co.*, 219 F.2d 303 (1955), which specifically points out there can be no defense of fraud committed after the relationship had been entered into, and *Sea Shipping Co.* v. *Sieracki*, 328

U.S. 85, 90, 97 (1946), which determined that the servant's status is decided solely by the work he does and not by any contract.

b. No court has ever held that fraud allegedly committed subsequent to the relationship of master and servant has ever voided that relationship *ab initio*.

c. Section V of the Federal Employers' Liability Act has, amongst its principal purposes, to void contracts whereby employers seek to water away rights of employees under the Federal Employers' Liability Act and the Jones Act.

It serves no useful purpose for Respondent to indulge in a criticism of these decisions. The fact remains that this case is in utter conflict with the decisions of this Court and those of other Courts of Appeals.

Respondent further avoids the issue when it states that Section V of the Federal Employers' Liability Act does not apply because one must be an employee to prosecute the action. The very purpose of this provision was to nullify any attempts by masters to circumvent their liability to men doing their work, and to void such an argument as this.

And the terms of the instruction complained of (R. 1846, 1847) assume that the employer could by contract lawfully impose certain terms and conditions by which the status of the servant would be determined — directly counter to Section V.

Nor is there any distortion of the opinion of the Court of Appeals which emasculates the affect of the *Rogers* and *Ferguson* cases (*Rogers* v. *Mo. P. Ry. Co.*, 352 U.S. 500; *Ferguson* v. *Moore-McCormick Lines*, 352 U.S. 550.) What justification could there be for excluding certain

issues from consideration by the jury when there was evidence to support them. The power of the courts to direct a verdict on certain charges is measured by the same test as its right to direct a verdict on all charges. The arena of judge and jury is the same on the question of whether a charge of case should be submitted to the jury.

Nor was the fact that instructions tendered by Petitioner were given mean that he is estopped from complaining about the giving of an instruction which confined recovery to certain limited charges.

There can be no question that this instruction was specifically and extensively objected to, and that the court clearly understood the objections. (R. 1696-1700.)[1]

Petitioner's objections to the instruction in question clearly meet the test laid down by this Court under Rule 51 of the Federal Rules of Civil Procedure, in *Palmer* v. *Hoffman*, 318 U.S. 109, 119.

It would have been obviously futile, after the Court's ruling on this instruction, to offer proposed instructions at variance with its ruling. Even in the 7th Circuit, the objection was sufficient to preserve the point for error without tender of a contradictory instruction. (*Wantland* v. *I. C. R. R. Co.*, 237 F.2d 921 (C.A. 7, 1956).

The Court of Appeals' statement that plaintiff made no offer of proof of other and safer methods does not reflect the record. An elaborate offer of proof was made. (A. 258-265) The Court expressly ruled that there was no objection to the form of the offer, and opposing counsel

[1] The discussion concluded by the statement by the petitioner's attorney: "All right. May the record show that we are objecting because it directs a verdict on the other charges."

concurred in this ruling.[2] The offer was proper. *Scotland County* v. *Hill*, 112 U.S. 183 (1884)

Thus, there is no justification whatsoever for failing to submit jury issues to the jury.

Significantly, respondent makes no defense whatsoever of the reasons given by the Court of Appeals for its refusal to consider the error alleged under Count II. Instead, respondent argues that the error committed under Count II in connection with post-employment fraud is academic in view of the Court's finding that petitioner sustained no injury on August 17, 1953.

The finding of no injury does not sustain the judgment under Count II. The complaint alleged, and it was undisputed, that petitioner suffered sickness and disability while a seaman on duty; was hospitalized at the direction of the Captain, and the fact of such sickness was recognized by the trial judge in his charge to the jury. Sickness as well as injury is recoverable under the maintenance and cure count. Whether petitioner fell or did not fall was of no legal significance.

Accordingly, there is no merit to Respondent's contention that the decree under Count II cannot be reviewed here. That decree embodies the same erroneous theory of law incorporated in the trial court's charge to the jury under Count I, which error of law was attacked by Petitioner in the Court of Appeals as common to both Counts.

[2] The Court to plaintiff's attorney: "No, he is not objecting to the form of your offer. . . . By Mr. McCreary, representing respondent: "That is right your Honor." By the Court: "That is right. That objection will be sustained." (A. 265)

The conclusion of the trial court that Petitioner's "employment on and after August 15, 1953, was null and void and of no effect" was plainly and directly counter to the fundamental principles governing the master and servant relationship and the express terms of the Shipowners' Liability Convention, which requires fraud to be available for a defense in maintenance and cure actions to occur "when the engagement is entered into."

Respectfully submitted,

JAMES A. DOOLEY
Attorney for Petitioner

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Petitioner's reply to respondent's brief in opposition to certiorari may not have been available to the Court for consideration at the time certiorari was denied. This petition for rehearing will supplement the petition for certiorari, respondent's opposing brief, and petitioner's r[illegible]. It will set forth substantial grounds not pre-vi[illegible] presented.

THE ALLEGED FRAUD OF PETITIONER.

Respondent's opposing brief (pp. 2-3) restates the issues tendered by the petition for certiorari. The first such issue relates to alleged post-employment fraud of petitioner.[1]

The main stress of respondent's brief on that issue seems directed to the purpose of discrediting petitioner, largely by marshalling selective portions of the evidence to demonstrate that he was in fact guilty of fraud. (Resp. Br, pp. 3-8)

The petition for certiorari did not go into the question of the sufficiency of evidence to support respondent's affirmative defense of fraud. Instead, it presented a clear question of law for this Court to decide, concerning the legal effect of fraud occurring some weeks after the seaman had been employed and engaged in the service of the ship; and involving alleged misrepresentations having no causal connection with the injury he suffered.

Petitioner's failure to argue the sufficiency of the evidence to sustain that defense was deliberate, for the purpose of narrowing the issues before this Court. Petitioner did not and does not concede that petitioner had been, in fact, guilty of fraud. It is believed, and petitioner accordingly asserts, that the evidence as a whole

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[1] Respondent's restatement inaccurately refers to the physical examination, occurring five weeks after petitioner had been employed, as having been "held as soon as practicable."

That statement has no support in and is contrary to the record.

Captain Brightstone of the Steamer Mills testified in detail concerning the numerous ports at which the vessel had docked during the five weeks petitioner was on board preceding his illness and fall. They included Cleveland, the home office of respondent, as well as Buffalo; South Chicago; Indiana Harbor; and Erie, Pennsylvania. (R 84-95)

in the record will compel the conclusion that petitioner, rather than being a perpetrator of fraud, was a victim; *and will demonstrate the wisdom of the rule of law requiring fraud to occur at the time of employment.*

Respondent in seeking to demonstrate that petitioner was guilty of fraud, quotes (pp. 6, 7) from the deposition of a Dr. Schuman, the physician who examined petitioner.

Schuman had no recollection whatsoever of examining petitioner, or even of being on board the steamer Mills. (A, 323, 325). His testimony was entirely a reconstruction of events, as shown, by a report of medical examination. He enacted the role of a witness.

The report thus used by Schuman was not the handwritten report which he had filled out and signed (Def. Ex. N, Pet. for Cert. p. 15a) but the typewritten report which he and petitioner had signed in blank and sent to respondent's home office, where typewritten entries were made thereon. (Def. Ex. O, Pet. for Cert. p. 16a).

Radical differences exist between the two reports. Of critical importance is the fact that the handwritten report contained no entry opposite the items calling for a history of back pain, or receipt of disability compensation, while the typewritten report had the word "no" opposite those items.

Respondent sought to explain these and other discrepancies between the two documents by evidence that by leaving a space blank, Schuman intended to report negative or normal. (A. 341). Were such an explanation to be accepted at face value, the accuracy of the typewritten report, and the reliability of Schuman's testimony

reconstructing the events that that report portrayed, are founded and depend upon the assumption that Schuman made inquiry concerning all items on the form, in the course of his examination of petitioner; and that Schuman did not, either purposely or inadvertently, fail to interrogate petitioner concerning certain items, thereby causing negative answers to be entered improperly on the typewritten form.

That basic assumption—necessary to validate the typed report and Schuman's testimony—is demonstrably unsound. Neither report had any entries opposite the items: age, height, weight and Wasserman. Dr. Ramsay, Schuman's employer, could not explain the absence of these entries. (A. 362).

Nor can these omissions be justified by any custom. The contrary is true. Respondent introduced in evidence 12 other reports by Dr. Schuman to show his customary practices in making entries.

All 12 of these other reports had entries opposite the items: age, height and weight. (A. 360).

Thus the basic assumption that Schuman obtained a complete history from petitioner in the course of his examination is positively disproved by respondent's own evidence. Petitioner testified positively that he had not been interrogated by Schuman concerning prior back trouble or receipt of disability compensation (A. 217, 235). The evidence of both parties is in accord on the incompleteness of Schuman's interrogation of petitioner.

Further corroboration of Schuman's failure to interrogate petitioner thoroughly is found in the fact that he used checkmarks on the handwritten report to indicate negative findings. There would obviously be no

need for checkmarks in the spaces to indicate a negative, if leaving the spaces blank automatically indicated a negative.

The checkmarks were clearly made to guarantee that the item checked had been covered during the examination. It is hardly consistent to leave items blank at the top of a form to indicate a negative finding, while using checkmarks in the lower half of a form to indicate a negative. If precaution demands a checkmark, that demand is applicable to history as it is to findings. Indeed, respondent's own evidence indicated the importance of the medical history of the seaman. (A. 297, 298, 308, 309, 369).

Nonetheless, respondent's explanation for absence of any checkmark or entry relating to back pain or disability compensation in the top part of the form was a custom by Schuman to have blank spaces there indicating negatively, and checkmarks to so indicate in the lower portion. Dr. Ramsay so testified for respondent. (A. 341).

Schuman's testimony and the typed report which the testimony reconstructed are further discredited by the manner in which the evidence was adduced by respondent to support its affirmative defense of fraud. Schuman's testimony consisted of a deposition of Schuman taken by respondent in New York City. At the deposition, the typed report, but not the handwritten report made by Schuman was produced. The handwritten report was retained by respondent at Cleveland. (A. 332).

On his direct examination, Schuman testified as if the typewritten report were the only one in existence. (A 299-302, 306-316) Only on cross examination was it learned that he had signed the typewritten report completely blank and that the real report was one in his own handwriting

which was not then available for use in his cross examination. (A. 329-330). When it developed on cross examination of Schuman that the typed report had not been made by him but only signed in blank, he volunteered information designed to justify his use of the typewritten report. Questions and answers were then asked and given (A 331, 332) as follows:

> "Q. Have you been shown your original report with your own handwriting, 'yes' or 'no,' Doctor, by Mr. McCreary? (Attorney for respondent)
>
> • • •
>
> A. He showed me the original of this Defendant's Exhibit A for identification, my copy. He showed it to me the first time when I met him, and I compared it with this, and it was similar to my copy which I had originally written about this history and physical examination, and I compared both papers, and it was identical.
>
> Q. When did you compare these papers?
>
> A. The first time I met Mr. McCreary about a month ago; it was about a month ago or about a month or two ago. I don't remember the exact time.
>
> Q. And at this time you are willing to state unequivocally that everything contained in your handwriting on that report is identical to this?
>
> A. Yes, sir.
>
> Q. Identical to this Defendant's Exhibit A for identification?
>
> A. Yes, sir."

Schuman's testimony was not in accord with the facts, and apparently designed to conceal differences between the two reports.

It was, of course, plain to respondent's counsel from the cross examination that Schuman's real report, the handwritten one, would have to be adduced in evidence

at the trial. On redirect examination, Schuman then testified concerning his custom of sometimes allowing spaces to remain blank to indicate a negative and sometimes entering checkmarks to indicate a negative. (A 333-334).

Counsel for petitioner had not seen the handwritten report until after Schuman's deposition was taken, but did see it by the time Dr. Ramsay testified for respondent. Numerous discrepancies were called to the attention of Ramsay. (A 365-368). He completely failed to explain entries on the typed report showing petitioner's urine to have a specific gravity of 1.020, and an acid reaction, when the handwritten report had no entry of any kind relating to those matters. (A 367).

Despite the discrepancies between the two reports, the trial judge allowed the testimony of Schuman to be received, "he said he compared (the typewritten report) with the one he made out in his own hand-writing." (A 336).

This was the evidence which caused petitioner to be branded a deliberate fraud despite his denial of being interrogated concerning prior back trouble.

This court in *Garrett* v. *Moore-McCormack Company*, 317 U.S. 239, (1942) required admiralty principles to be applied in judicial scrutiny of dealings between seamen and shipowners. It is difficult to reconcile the actions of the Courts below with this Court's teachings.

At the time the seaman is considering entering on duty as a seaman, he is free to decide whether he will execute a blank form. Once in the service of the ship, he naturally feels an obligation of obedience to the dictates of his employer. The record as a whole, including the

manner in which respondent caused petitioner to execute forms, one completely and another partially blank, demonstrates the soundness of the rule that only fraud at the time of the engagement constitutes a defense in an action to enforce seamen's remedies. Petitioner has been found guilty of fraud based on entries made on the forms after he signed them, having been ordered to sign the forms while in the service of respondent.

THE FAILURE OF THE COURT OF APPEALS TO REVIEW COUNT II.

The third question presented by petitioner in the petition for certiorari relates to the failure of the Court of Appeals to review the action taken under Count II for maintenance and cure, because of certain statements singled out in petitioner's brief filed with that Court. Respondent in "restating" this question radically alters it so as to substitute for it another of its own choosing. Respondent's restatement ignores the ruling of the Court of Appeals that petitioner in his brief had waived error under Count II. Respondent instead seeks to uphold the failure of the Court of Appeals to review Count II on the ground that the finding of no injury made by the trial court required its decree to be sustained if review were had. The reason assigned by the Court of Appeals for denying review of Count II was undefended because indefensible.

The discretion granted this Court to review or deny review on certiorari presupposes that review may be had by a Court of Appeals. Concededly this Court cannot review every decision by the Courts of Appeal; but claimants in federal courts are entitled to review of District Court action. That right, denied by the Court of Appeals,

will be denied petitioner here, unless this Court grants certiorari.

THE SHIPOWNER'S LIABILITY CONVENTION ELIMINATES RESPONDENT'S DEFENSE OF FRAUD.

The Shipowner's Liability Convention grants a seaman a remedy of maintenance and cure for sickness as well as injury. The complaint alleged that petitioner became sick and disabled, these allegations being incorporated free from the charge of negligence, in Count II, (A 7, 8). Respondent does not contest the fact that petitioner became sick and disabled while in the service of the ship, nor the proposition that such sickness makes the finding of no injury inadequate to support the Court's decree under Count II.[2]

Nor was any request for a finding of sickness necessary. According to the provisions of Rule 52, "requests for findings are not necessary for purposes of review".[3]

Respondent's assertion that petitioner has failed to establish that the Shipowner's Liability Convention applied to the *locus in quo* of the alleged accident (Resp. Br. p. 14) is not accurate. Admissions made by the

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[2] The findings must sustain the decree. **Panama Mail Steamship Co. v. Vargas**, 281 U.S. 670 (1930); **Desch v. U.S.**, 186 F. 2d 623 (C.A. 7 1951); **Victory Towing Co. v. Bordelon**, 219 F. 2d 540, (C.A. 8, 1955.)

[3] Both Rule 46½ of the Admiralty Rules of this Court and Rule 52 of the Federal Rules of Civil Procedure require the trial court to "find the facts specially." The Rules of the District Court of the Northern District of Illinois make Rule 52 of the Federal Rules applicable to the findings and decree in this case. Local Admiralty Rule 33 is a catch-all making local civil rules applicable to admiralty proceedings. Local civil Rule 19 is a similar catch-all, making Rule 52 of the Federal Rules apply because of the lack of any other governing provision.

pleadings, coupled with the terms of the convention, clearly bring petitioner within the protection of the convention.[4]

The Shipowner's Liability Convention in clear and unmistakable language confines the defense of fraud to that occurring "when the engagement is entered into." (Article 2.2(c), Pet. for Cert. p. 3a). This Court has ruled that in the field of seamen's remedies, there is a "common core of policies which has been controlling although the specific issue has varied from a question of admiralty jurisdiction to one of coverage under the statutory field." (*Sea's Shipping Co.* v. *Surracki*, 328 U.S. 85 (1946) at p. 99). At least one Court of Appeals has honored this principle "Generally the criteria for determining whether or not plaintiff is a 'seaman' for purposes of maintenance and cure are the same as those governing his right to re-

---

[4] By Article I of the convention it is applicable to all persons on board of vessels other than warships, registered in a territory for which the convention is in force, and ordinarily engaged in maritime navigation. The application is further delineated by U.S. understandings annexed to and a part of the convention. (Pet. for Cert., App. pp. 3a-4a).

According to the U.S. understandings, the phrase "vessels registered in the territory" includes all vessels of the United States as defined under the laws of the United States. "Vessel" is defined, 1 U.S.C. Sec. 3, broadly to include "every description of watercraft . . . capable of being used as a means of transportation on water." Again, 46 U.S.C. Sec. 251 provides in part: "Vessels of 20 tons and upwards enrolled . . . and having a license in force shall be deemed vessels of the United States . . ." The complaint alleges and respondent's answer concedes that the steamship Mills was "a vessel duly enrolled and licensed . . . of more than 20 tons burden . . . and employed in the business of commerce and navigation between places in different states and territories upon the Great Lakes and foreign countries . . ." during the time of all events mentioned in the complaint (A 4, 14). Brightstone, Captain of the steamer Mills, testified that the ship was registered with the United States Coast Guard (R 96). The Great Lakes, being largely international bodies of water, separating the United States from Canada, are a part of the "High Seas." U.S. v. **Rodgers**, 150 U.S. 49 (1893).

cover under the Jones Act, 46 USC 688." (*Weiss* v. *Central Railroad of New Jersey*, 235 F. 2d 309 (C.A. 2d, 1956)

Accordingly, the limitation imposed by the treaty on the defense of fraud in maintenance and cure actions, is applicable to the Jones Act action.

The Court of Appeals, by failing to review Count II for maintenance and cure, allowed the judgment to stand thereunder in direct conflict with the mandate of the convention; and disregarded the teaching of this Court in the *Sea's Shipping Company* case in failing to apply the principle of the convention to the statutory right involved in Count I.

CONCLUSION.

For the reasons asserted herein, in addition to those previously asserted in the petition for certiorari and the reply to respondent's brief in opposition, it is respectfully submitted that certiorari should be granted. The issue on certiorari is whether seamen's suits are to be given fair and thorough consideration by lower Federal Courts in deference to the decisions of this Court.

Respectfully submitted,
JAMES A. DOOLEY,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

JAMES A. DOOLEY,
Counsel for Petitioner.